

## **Guidance for Handling Cases of Released *Franco-Gonzales v. Holder* Class Members**

*Franco-Gonzales v. Holder* is a class action lawsuit filed in the Central District of California on behalf of unrepresented individuals in the custody of the Department of Homeland Security (“DHS”), Immigration and Customs Enforcement (“ICE”), in Arizona, California, and Washington identified as having a serious mental disorder that may render them incompetent to represent themselves in immigration proceedings.

On April 23, 2013, the District Court issued a Permanent Injunction,<sup>1</sup> requiring the government to provide: (1) legal representation in the form of a Qualified Representative to all Class Members found mentally incompetent to represent themselves in immigration proceedings; and (2) bond redetermination hearings for all Class Members detained for more than six months. On October 29, 2014, the District Court entered an Order further implementing the Permanent Injunction (Implementation Order),<sup>2</sup> which sets forth procedures and processes for identification of *Franco* Class Members and assessment of the mental competency of such Class Members to represent themselves in immigration proceedings. Specifically, the Implementation Order requires implementation of an ICE screening and information gathering system to identify Class Members; an information sharing system to ensure that relevant documentation and information regarding Class Members is provided by ICE to the Executive Office for Immigration Review (EOIR); and an evaluation system for Immigration Judges to follow in order to determine whether Class Members are mentally competent to represent themselves in immigration proceedings.

The Implementation Order extends certain protections under the Injunction and the Implementation Order to Class Members who are released from detention. These protections apply regardless of the state in which the Class Member’s case is transferred after release from custody, including states outside California, Arizona, and Washington. Therefore, it is critical that Immigration Judges and court staff nationwide be familiar with the applicable requirements under the *Franco* Injunction and Implementation Order for released Class Members.

To this end, this guidance is intended to provide a general overview of the Injunction and Implementation Order<sup>3</sup> as it relates to released *Franco* class member appearing before non-detained courts; however, the guidance is not intended to replace training on adjudicating competence. Therefore, if a released *Franco* class member will appear on your docket, **please contact:** your Assistant Chief Immigration Judge; Assistant Chief Immigration Judge for Vulnerable Populations Jack Weil; and/or Helaine Perlman ([Helaine.Perlman@usdoj.gov](mailto:Helaine.Perlman@usdoj.gov)) or Christina Baptista ([Christina.Baptista@usdoj.gov](mailto:Christina.Baptista@usdoj.gov)) in the Office of General Counsel for further instructions and information.

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<sup>1</sup> *Franco-Gonzales v. Holder*, CV 10-02211, Partial Judgment and Permanent Injunction (C.D. Cal. R. Apr. 23, 2013).

<sup>2</sup> *Franco-Gonzales v. Holder*, CV 10-02211, Order Further Implementing This Court’s Permanent Injunction (C.D. Cal. R. Oct. 29, 2014).

<sup>3</sup> Nothing in this document is intended to negate or alter EOIR’s obligations under the Permanent Injunction and Implementation Order or any other orders of the Court in *Franco-Gonzales v. Holder*. In all instances, the obligations set forth in the Court orders control.

## I. Class Membership<sup>4</sup>

The following individuals meet the definition of *Franco* class membership –

### *Main Class Members:*

- Those who are or will be in DHS (ICE) custody for immigration proceedings in Arizona, California, and Washington;
- Who have been identified by or to medical personnel, DHS (ICE), or an Immigration Judge as having a serious mental disorder or defect that may render them incompetent to represent themselves in immigration proceedings;
- Who presently lack counsel in immigration proceedings; *and*
- Who meet specific medical criteria as determined by an ICE Qualified Mental Health Provider *or* for whom an Immigration Judge has found a bona fide doubt about the respondent's competence to represent him- or herself based upon the evidence in the record.

*Sub-Class One Members:*<sup>5</sup> Main Class Members who have a serious mental disorder or defect that renders them incompetent to represent themselves in immigration proceedings.

*Sub-Class Two Members:* Main Class Members who have been detained for more than six months.

## II. Overview of EOIR's System for Evaluating Competence<sup>6</sup>

A respondent is first identified as a *Franco* Main Class Member when either: (1) an ICE Qualified Mental Health Provider notifies ICE Office of the Chief Counsel (OCC) that a respondent meets specified medical criteria; or (2) the Immigration Judge makes a finding of *bona fide* doubt regarding the respondent's competence to represent him- or herself based upon the evidence of the record.

Within twenty-one (21) days of when a Main Class Member is identified, ICE OCC must file a Notice of Class Membership with supporting documentation, with the Immigration Court or, as appropriate, the Board of Immigration Appeals (Board). Upon receipt of the Notice of Class Membership, the Immigration Judge has twenty-one (21) days to conduct a Judicial Competency Inquiry (JCI).<sup>7</sup> At the JCI, the Immigration Judge must assess whether the Class Member is competent to represent him- or herself. If there is insufficient evidence to make that determination, the Immigration Judge must order a Forensic Competency Evaluation (FCE) and set the case over for a Competency Review hearing.

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<sup>4</sup> *Franco-Gonzales*, Implementation Order at 2, 6-7, 23-24.

<sup>5</sup> Note: Main Class Members can be both Sub-Class One and Sub-Class Two Members.

<sup>6</sup> *Franco-Gonzales*, Implementation Order at 15-21.

<sup>7</sup> The Implementation Order permits extensions for the JCI (and the Forensic Competency Evaluations and Competency Reviews, as set forth below) under specified circumstances. *Id.* at 18.

The FCE is an examination conducted by a mental health provider<sup>8</sup> as provided through a program administered by EOIR. It must be conducted and a report provided to the Immigration Judge and both parties within forty-five (45) days of the Immigration Judge's order for the FCE.

Upon receipt of the FCE, the Immigration Judge must conduct a Competency Review (CR) within thirty (30) days. At the CR, the Immigration Judge must assess whether the Class Member is competent to represent him- or herself and, at its conclusion, make a finding of competency or incompetency.

If, at the conclusion of either the JCI or CR, the Immigration Judge finds the Class Member incompetent (i.e., to be a Sub-Class One Member), the Sub-Class One Member must be provided with a Qualified Representative.<sup>9</sup>

### III. Release of Main Class and Sub-Class Members

The procedural protections set forth in the Permanent Injunction and the Implementation Order are limited to respondents who are detained in ICE custody in Arizona, California, and Washington, except as set forth below:

#### *Released Main Class Members*<sup>10</sup>

The procedural protections afforded to released Main Class Members fall into two categories: 1) those who are released after a Notice of Class Membership is filed with the Immigration Court or the Board, but *before* an FCE is ordered or competency has been determined; and 2) those released *after* an FCE has been ordered but *before* a competency determination has been made.

For the first category, those who are released after the Immigration Court or the Board have received a Notice of Class Membership, but an FCE has not yet been ordered, the Main Class Member is *not entitled* to the procedural protections set forth in the Permanent Injunction or the Implementation Order. However, if the released Main Class Member fails to appear at a future immigration proceeding for an unexcused reason or no reason, **the released Main Class Member cannot be ordered removed in absentia** unless the Main Class Member is (1) represented at his or her immigration proceedings; or (2) the Immigration Judge has determined, prior to the Main Class Member's failure to appear, that the Main Class Member is competent to represent him- or herself.

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<sup>8</sup> Except in very rare exigent circumstances, the FCE must be conducted in person, and not by teleconference, videoconference, or other remote access means.

<sup>9</sup> A Qualified Representative is defined as an attorney, law student or law graduate directly supervised by a licensed attorney, or an accredited representative, all as defined by 8 C.F.R. § 1292.1. The Qualified Representative will be provided to the respondent through EOIR's National Qualified Representative Program.

<sup>10</sup> *Franco-Gonzales*, Implementation Order at 22-23.

For the second category, Main Class Members who are released after the FCE is ordered but before the competency determination is made, the Main Class Member continues to be entitled to completion of the FCE and the CR after release from custody. The general timelines for the FCE and CR noted above do not apply on the non-detained docket, except that the Immigration Judge must conduct the CR within forty-five (45) days of receiving the FCE report.<sup>11</sup> If the Immigration Judge determines that the Class Member is incompetent at the completion of the CR, the Class Member must be provided with a Qualified Representative.

**If such a Main Class Member appears before you, please contact ACIJ Jack Weil for further instructions regarding next steps, including: scheduling and coordinating the FCE; conducting a CR; and, as appropriate, providing a Qualified Representative.**

*Sub-Class One Members*<sup>12</sup>

A released Sub-Class One Member remains entitled to continued representation by the Qualified Representative until the conclusion of his or her immigration proceedings irrespective of detention status or change of venue, including if a Sub-Class One Member is transferred or moves outside of California, Washington, or Arizona.

**IV. Reopening<sup>13</sup>**

The reopening settlement agreement in *Franco-Gonzalez v. Holder* (“Settlement Agreement”) provides that certain individuals that may be *Franco* Class Members who have received final orders of removal may be entitled to seek reopening of their immigration proceedings. The Settlement Agreement was approved by the Court on September 25, 2015, and thus, the Office of the General Counsel anticipates that these motions will come before your courts until the final date that they may be submitted, March 27, 2017. These Class Members will be entitled to equitable tolling of the time and numerical limitations set forth in the Immigration and Nationality Act and its implementing regulations regarding motions to reopen, and accepted for adjudication on the merits. Guidance has been provided to your courts regarding these Settlement Agreement motions to reopen, but please do not hesitate to contact the Office of the General Counsel should you have any questions.

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<sup>11</sup> A Class Member’s failure to appear for the FCE for no reason or an unexcused reason may forfeit the Class Member’s right to the FCE, and in such a case, the Immigration Judge may make a competency determination without an FCE.

<sup>12</sup> *Franco-Gonzales*, Implementation Order at 23.

<sup>13</sup> *Id.* at 25-26.